IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 7111 OF 2004

LARSEN & TOUBRO LTD. ... PETITIONERS

vs

KANTILAL CHAMPALAL KOTHARI & ORS... RESPONDENTS

Mr. V. A. Thorat Sr. Counsel with Ranjit Thorat & Mr. Vikram Trivedi and Mr. Faisal Sayyed for petitioners

Mr. Y. S. Jahagirdar Sr. Advocate with a. V. Anturkar with Shri V. B. Naik and P. N. Vora i/b Pramodkumar & Co. for respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-31-1-2005

P.C.

Being aggrieved by the judgment and order dated 28th July, 2004 passed by the Bench of Small Causes Court dismissing the revision filed by

the petitioner/original defendant 1 against judgment and order dated 7th of April, 2004 passed by the Small Causes Court at Mumbai on Interim Notice No. 74 of 2004 in T.E. & R Suit No. 32/35 of 2001, discharging the notice taken out by original defendant 1 praying that it may be impleaded as a party plaintiff / Co-Plaintiff in the suit in its capacity as a co-owner or in the alternative as party defendant / co-defendant in its capacity as a co-owner, defendant 1 has filed this writ petition. For the sake of convenience the parties are referred to in this judgment as per their status in Suit No. 32/35/01 ("the suit" for short).

2. It is the case of the plaintiff that the plaintiff and defendant 2 in the said suit are the owners of the immovable property being a plot of land bearing C.T.S. No. C-1374 to C-1377, admeasuring about 3,633 square yards equivalent to 3038.75 sq. meters of village Bandra (West), together with a bungalow consisting of a basement, ground and first floors, servant's quarters and toilet as more particularly described in paragraph 1 of the plaint ("the suit premises" for short):

3. Under the Deed of Lease dated 27-1-1961 the predecessor of the plaintiffs leased the suit premises to defendant 1. It is the case of the plaintiffs that the period of lease had expired by efflux of time on 26-1-1970. However,

defendant 1 did not vacate the suit premises. Consequently the plaintiff sent a notice to defendant 1, however defendant 1 refused to vacate the suit premises. The plaintiffs, therefore, were desirous of filing a suit for eviction of defendant 1. The plaintiffs claim that they called upon defendant 2 to cooperate and join them in filing the suit, however, defendant 2 did not cooperate. Therefore, the instant suit came to be filed for eviction of defendant 1 in which defendant 2 also came to be impleaded as party defendant.

4. It appears that after the suit was filed defendant 1 has acquired from defendant 2 under conveyance deed dated 30th August, 2001 7% undivided share in the ownership of the suit property. It is against this background that defendant 1 is claiming ownership.

5. I have heard at considerable length Mr. Thorat, learned counsel appearing for the petitioners. He contended that the lower appellate court fell into a grave error in coming to a conclusion that the revision filed by defendant 1 was not maintainable. The learned counsel relied upon several decisions of this court. Suffice it to refer to the judgment in **The Colaba Central Co-operative Consumer Wholesale and Retail Stores Ltd. v. Smt. Kusumben Kantilal Shah & Ors., 2003(4) ALL MR 304.** Relying on this judgment he contended that the order impugned before the

lower appellate court is not a procedural order. It is an order of moment. So far as defendant No. 1 is concerned it is a final order and, therefore, revision application challenging the said order is perfectly maintainable. The learned counsel contended that the lower appellate court's approach was, therefore, not proper. It's view that the revision is not maintainable has weighed with it while deciding the merits of defendant No. 1's case and, therefore, there is no proper appreciation of defendant 1's submissions. In fact the lower appellate court has not considered whether defendant 1 is a proper party or necessary party. The learned counsel further contended that the lower appellate court has failed to appreciate the ratio of the judgment of the Supreme Court in **T. Lakshmipathi and Ors. v. P. Nithyananda Reddy & ors., A.I.R. 2003 S.C. 2427.** He contended that in this judgment the Supreme Court has observed that a co-owner has interest in every inch of the common property. He submitted that it was, therefore, absolutely necessary for the courts below to implead defendant 1 as either co-plaintiff or defendant in its capacity as a co-owner.

6. As against this Mr. Jahagirdar the learned counsel for the respondents contended that no interference is necessary with the impugned orders. He contended that the application preferred by defendant 1 is malafide. He submitted that defendant 1 has filed a suit in this court against the plaintiffs for partition claiming that it has acquired 7%

undivided share, title and interest in the suit premises. In the premption suit pending between the plaintiffs, defendant 1 got itself added as a party defendant. Mr. Jahagirdar contended that this is yet another attempt to cause harassment to the plaintiffs. He submitted that in the light of the judgment in **Lakshmipatiu's case (supra),** defendant 1's application is rightly rejected.

7. In my opinion, it is not really necessary for me to go into the question whether the present revision application was maintainable or not before the lower appellate court because lower appellate court has gone into the merits and discharged the notice. Having perused the pleadings of the parties and having heard both the learned counsel and also having read the judgment of the Supreme Court in **Lakshmipathi's case (supra).** I am of the opinion that the notice taken out by defendant 1 was rightly discharged.

8. In **Lakshmipathi's case (supra)** somewhat similar question fell for consideration of the Supreme Court and the Supreme Court observed that if a co-owner who has a partial interest in the property sells that interest to a tenant, the tenancy of such a tenant does not merge into ownership. He is estopped from denying the ownership of a co-owner. The co-owner can always file a suit for the eviction of such a tenant even though he acquires partial interest in the property. In this case

admittedly defendant 1 has acquired only 7% interest in the property. In the light of the above judgment, therefore, defendant 1 cannot be impleaded in the suit as a co-owner because it's tenancy does not merge into ownership entailing determination of tenancy. No fault, therefore, can be found with the impugned judgments and orders. The petition is, therefore, rejected.

9. At this stage the learned counsel for the petitioner states that since the petitioner is desirous of challenging this order the suit be stayed. Mr. Jahagirdar, the learned counsel for the respondents objects. In the circumstance of the case T.E. & R. Suit No. 32/35 of 2001 pending in the Small Causes Court at Mumbai is stayed for six weeks from today.

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